UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GERALD ROLERSON,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Civil No. 95-170-B-H***
	)	
MAINE DEPARTMENT OF CORRECTIONS,[1]	***)***	
	)	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The pro se petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his murder conviction following a jury trial in the Maine Superior Court (Knox County) (Criminal Docket No. KNO-90-110). He alleges deprivation of his right to testify in his defense, and ineffective assistance of counsel based on counsel's denial of a meaningful opportunity to exercise that right. I recommend that the court deny the petition.

I. Background

Petitioner Gerald Rolerson spent the late afternoon of January 1, 1989 with Joel Bowman, David Turner and Charles Novinsky during which they obtained a shotgun and shells from the houses of several friends. *State v. Rolerson*, 593 A.2d 220, 221-22 (Me. 1991). The petitioner states

[1] The petitioner named as respondent Martin Magnusson, the warden of the Maine State Prison. The state of Maine is the real party in interest, and it is therefore appropriate to treat the state as such. *See Scarpa v. Dubois*, 38 F.3d 1, 6 (1st Cir. 1994), *cert. denied*, 130 L. Ed. 2d 885 (1995).

that the group was preparing to go night hunting. Memorandum in Support of Habeas Petition ("Petitioner's Memorandum") at 3, attached to Petition Under 28 USC § 2254 for Writ of Habeas Corpus (Docket No. 1). With the petitioner driving, the group picked up Randall Lind at his home. *Rolerson*, 593 A.2d at 222. The petitioner states that, as they were driving around, Bowman got into an argument with Lind, who said he was going to leave because Bowman and the others were too drunk. Petitioner's Memorandum at 4. The petitioner stopped the car, Lind got out and Bowman quickly followed. *Id.* Bowman then shot Lind in the back of the head. *Rolerson*, 593 A.2d at 222. After fleeing the state, the four men were apprehended in Maryland on January 2, 1989. *Id.* at 221-22.

The petitioner and Bowman were tried together, though with separate juries. *Id.* at 221. The petitioner's trial counsel planned to show that Bowman had acted alone, that there was no plan to harm Lind, and that the petitioner had no motive to harm Lind. Deposition of Stanley W. Brown, Jr. ("Brown Dep.") at 11; *see id.* at 12-13. As the petitioner concedes, counsel told the petitioner before trial that the decision about whether to testify was his, the petitioner's. Petitioner's Memorandum at 6. Counsel also told the petitioner that it was still an open issue, depending on the evidence introduced at trial. Brown Dep. at 15. During the trial, they had several discussions concerning defense strategy and whether the petitioner would testify. Transcript of Post-Conviction Review Hearing on Apr. 1, 1994 ("Hearing Trans.") at 11-12. The petitioner states that he told counsel, before and during the trial, that he wanted to testify. Petitioner's Memorandum at 5.

At the end of the defense case, the petitioner and his counsel had a discussion concerning whether or not he would testify. Hearing Trans. at 13. Earlier that day, the petitioner had expressed reservations as to whether he could "keep his cool" on the witness stand. *Id.* at 13-14. During the

final discussion, the petitioner first felt that he should not testify, but then thought maybe he should. *Id*. at 14. At that point, counsel asked if he was sure. *Id*. Counsel reviewed the relevant factors and recommended against testifying. *Id*. "[The petitioner's] decision was I guess I won't." *Id.* at 15.

Several factors influenced this recommendation. First, counsel was concerned that the prosecutor might "get to" the petitioner on the stand. *Id.* at 13-14. The petitioner expressed some doubt as to whether he could "keep his cool" on the stand, *id.*, and said he was afraid of the prosecutor, Brown Dep. at 17-18. Counsel also observed that the petitioner had "the type of temperament that you can easily get under his skin." Brown Dep. at 17. Furthermore, counsel felt that the state did not have a strong case against the petitioner. Hearing Trans. at 14.

The petitioner was found guilty of murder and sentenced to imprisonment for a term of forty years. *Rolerson*, 593 A.2d at 221. He appealed to the Law Court, which affirmed both the conviction and the sentence. *Id.* at 223. He then filed a petition for post-conviction review, asserting that he was denied the opportunity to testify in his defense because of ineffective assistance of counsel. Order of Justice Francis C. Marsano, Nov. 28, 1994, Knox County, Crim. Docket No. 91-454 ("P-C Review Order") at 1-2. The petitioner and his counsel testified on March 9 and April 1, 1994, respectively. *Id.* at 2. The court also considered counsel's deposition testimony. *Id.* The court found "as a matter of fact that the Petitioner made a knowing, voluntary and intelligent waiver" of his right to testify in his defense, *id.* at 8, and that counsel's pretrial and trial representation "met the standard of what a reasonable, fallible attorney would have done," *id.* at 9.

II. Grounds for Relief

The petitioner's arguments involve the constitutional right of a criminal defendant to testify

in his defense. He claims that he did not knowingly and voluntarily waive this right; that the trial court erred by failing to inquire whether he had waived this right; and that he was denied effective assistance of counsel because his trial counsel refused to allow him to testify.

The right of a criminal defendant to testify on his own behalf is fundamental. *United States v. Butts*, 630 F. Supp. 1145, 1148 (D. Me. 1986). This right may be abrogated not only by counsel's failure to call a defendant to testify, but also by counsel's failure to provide adequate information about the right to testify and competent legal advice about whether to exercise that right, thus preventing the defendant from making an informed decision. *See Lema v. United States*, 987 F.2d 48, 52-53 (1st Cir. 1993). Only with sufficient information may a defendant be said to have "knowingly and voluntarily" waived the right. *Id.* at 52; *see also Wogan v. United States*, 846 F. Supp. 135, 141 (D. Me. 1994).

Because of the fundamental nature of a criminal defendant's right to testify, an ineffective assistance of counsel claim based on denial of that right is not analyzed in terms of whether the error prejudiced the defense. *Butts*, 630 F. Supp. at 1148-49 (no need to apply prejudice prong of *Strickland* test); *cf. Strickland v. Washington*, 466 U.S. 668, 687 (1984) (ineffective assistance of counsel found where attorney's performance was deficient *and* defense was thereby prejudiced). Rather, "prejudice is sufficiently proven, if not to be presumed from, the resulting denial of the defendant's right to testify."[2] *Butts*, 630 F. Supp. at 1149.

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[2] The Court of Appeals for the First Circuit has reserved both the question of whether the right to testify is fundamental, and the related question of whether the denial of that right should be subjected to a "harmless error" analysis. *See Lema*, 987 F.2d at 52 n.3, 53 n.4. However, as the First Circuit has recognized, the Supreme Court has described this right as "fundamental" in dictum. *See Rock v. Arkansas*, 483 U.S. 44, 53 n.10 (1987) ("On numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a (continued...)

A. Waiver

The state court found, on post-conviction review, that the petitioner made a knowing, voluntary and intelligent waiver of his right to testify in his own defense. This finding must be presumed correct unless it is not fairly supported by the record. *See* 28 U.S.C. § 2254(d)(8).[3] I find ample support in the record for the post-conviction finding. Counsel testified that he told the petitioner the decision was his, and that in the final discussion the petitioner decided, "I guess I won't." This testimony fairly supports the justice's finding of a knowing and voluntary waiver.

The petitioner's reference to three letters he allegedly wrote to his trial counsel, but which were not introduced at the post-conviction review hearing, is unavailing. The April 25, 1989 letter expresses the petitioner's pretrial desire to testify. Exh. A to Petitioner's Memorandum. The October 4, 1989 letter reaffirms this desire during trial. Exh. B to Petitioner's Memorandum. However, the discussion upon which the post-conviction court premised its finding of a valid waiver occurred at the end of the defense case. Hearing Trans. at 13-15. The prosecution did not rest until

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[2] (...continued)
fundamental constitutional right."). "To deny a defendant the right to tell his story from the stand dehumanizes the administration of justice." *Wright v. Estelle*, 572 F.2d 1071, 1078 (5th Cir.) (Goldberg, J., dissenting), *cert. denied*, 439 U.S. 1004 (1978).

[3] The other circumstances invalidating the presumption of correctness are: (1) the merits of the factual dispute were not resolved in the state proceeding; (2) the state court's factfinding procedure did not provide a full and fair hearing of the issue; (3) the material facts were not adequately developed before the state court; (4) the state court lacked subject matter or personal jurisdiction; (5) the petitioner was indigent and deprived of his or her right to counsel; (6) the petitioner did not receive a full, fair and adequate hearing in state court; and (7) the petitioner was otherwise denied due process. 28 U.S.C. § 2254(d)(1)-(7).

October 6,[4] so the October 4 letter predates the final discussion. The petitioner's intentions before that final discussion are irrelevant to whether he subsequently waived his right to testify. The October 28, 1989 letter post-dates the conviction and is irrelevant to the waiver issue. Exh. C to Petitioner's Memorandum.[5]

B. Failure to Inquire

The petitioner argues that the trial court should have inquired whether he knowingly and voluntarily waived his right to testify. The Constitution imposes no such requirement. *Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir. 1987) (no constitutional requirement that trial judge address criminal defendant, explain right to testify, and ask whether he wishes to waive that right). "To require the trial court to follow a special procedure, explicitly telling defendant about, and securing an explicit waiver of, a privilege *to* testify (whether administered within or outside the jury's hearing), could inappropriately influence the defendant to waive his constitutional right *not* to testify, thus threatening the exercise of this other, converse, constitutionally explicit, and more fragile right." *Id.* The trial court's choice not to inquire was entirely proper.

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[4] Trial Transcript, *State of Maine v. Joel Bowman and Gerald Rolerson*, Me. Super. Ct. Knox County, Crim. Nos. 90-123 & 90-110, at 369, 453.

[5] The petitioner has requested an evidentiary hearing because of a "substantial allegation of newly discovered evidence and [because] material facts were not adequately developed at the state-court hearing." Petitioner's Objection to the State's Answer to a Petition for a Writ of Habeas Corpus (Docket No. 8) at 1. As I have just discussed, the letters do not undermine the finding of a knowing and voluntary waiver. Accordingly, his request for an evidentiary hearing is denied. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992) (habeas petitioner entitled to evidentiary hearing if he can show both cause for failure to develop facts in state court proceeding, and *actual prejudice* resulting from that failure). Because there will be no evidentiary hearing and the petitioner's claims are well understood by the court, I also deny the petitioner's motion for appointment of counsel.

C. Ineffective Assistance of Counsel

To the extent that the petitioner claims his attorney denied him a meaningful opportunity to exercise his right to testify, this claim fails because of the finding that he knowingly and voluntarily waived that right. Mindful of the disadvantage confronting pro se litigants, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (holding pro se inmate's § 1983 complaint "to less stringent standard than formal pleadings drafted by lawyers"), I will treat this claim as an attack on counsel's advice that he not testify.

Although the petitioner need not demonstrate prejudice, *see Butts*, 630 F. Supp. at 1148-49, he must demonstrate that his counsel's performance was constitutionally deficient, *i.e.*, that it fell below an objective standard of reasonableness. *Matthews v. Rakiey*, 54 F.3d 908, 916 (1st Cir. 1995) (citing *Strickland*, 466 U.S. at 687-88). The petitioner "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. (quoting *Strickland*, 466 U.S. at 689). "The decision whether to call a particular witness is almost always strategic, requiring a balancing of the benefits and risks of the anticipated testimony." *Lema*, 987 F.2d at 54.

The post-conviction court found that counsel's pretrial and trial representation "met the standard of what a reasonable, fallible attorney would have done." This finding is fairly supported by the record, and accordingly is presumed to be correct. 28 U.S.C. § 2254(d)(8). Counsel explained his reasons for recommending against the petitioner testifying. Significantly, he was concerned that the prosecutor would rattle the petitioner on the witness stand. The petitioner himself had admitted to this concern, and to being "afraid" of the prosecutor. Counsel also felt that the

state's case was not very strong. Given these facts, his recommendation must be considered sound trial strategy. Counsel, in his professional judgment, reasonably determined that the risks of the petitioner testifying outweighed the possible benefits.[6] *See* Brown Dep. at 25.

The petitioner apparently argues that he would have provided other exculpatory testimony. There was a single boot print found at the scene, and the prosecution tried to link the print to the petitioner. *See* Hearing Trans. at 7. After the trial, the petitioner told counsel that, when he heard the gunshot, he stepped out of the car to see what happened, apparently making the boot print. Brown Dep. at 10. Such testimony would have provided a non-incriminating explanation of the boot print. He further claims that, when Bowman returned to the car after the shooting, he forced the petitioner into the car at gunpoint and forced him to leave the scene and go to Maryland. Hearing Trans. at 9. Such testimony would have provided a non-incriminating explanation of why he fled the state.

Counsel testified, however, that the petitioner never told him these facts before or during the trial. Hearing Trans. at 8-9; Brown Dep. at 10, 31-32. The post-conviction court found that "[t]he facts as presented by the Petitioner through his testimony are not persuasive and the Court does not find them credible. Rolerson's statement that Bowman 'stuck the gun in my chest and said, "Let's go,"' and then made Rolerson drive the route that he did, is unconvincing at best." P-C Review Order at 8. Given counsel's testimony that he had never heard these statements before, Hearing

[6] The benefits may have included the petitioner's testimony that he had no prior knowledge Bowman was going to kill Lind, and that Bowman killed Lind because of an argument over Lind's physical abuse of his wife, Bowman's sister. Petitioner's Memorandum at 7. This testimony, if believed, may have refuted the prosecution's theory that the argument involved Rolerson's and Bowman's belief that Lind was a "narc" who had given information to the police concerning Rolerson's drug-related activities. *See Rolerson*, 593 A.2d at 222.

Trans. at 8-9, the record fairly supports the post-conviction court's findings.

III. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be ***DENIED*** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 17th day of January, 1996.

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David M. Cohen
United States Magistrate Judge